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10  
11 **UNITED STATES DISTRICT COURT**  
12 **EASTERN DISTRICT OF CALIFORNIA**

13 DORA SOLARES, an individual,

14 Plaintiff,

15 v.  
16

17 RALPH DIAZ, in his individual  
capacity, KENNETH CLARK, in his  
18 individual capacity, JOSEPH BURNS,  
19 in his individual, and DOES 1 TO 15, in  
their individual capacities

20 Defendants.  
21

Case No. 1:20-cv-00323-LHR-BAM

**[PROPOSED] ORDER RE:  
MENTAL HEALTH RECORDS**

22 **MEMORANDUM DECISION AND ORDER**

23 **I. BACKGROUND:**

24 Plaintiff Dora Solares filed this action on behalf of her deceased son, Luis  
25 Romero, who was brutally murdered on or around March 8, 2019, while in the  
26 custody of the California Department of Corrections and Rehabilitation (CDCR).  
27 Plaintiff alleges that Mr. Romero was murdered by his cellmate, Jaime Osuna, and  
28

1 the defendants, including Defendant Sergeant Joseph Burnes, improperly permitted  
2 Mr. Osuna to share a cell with Mr. Romero. Plaintiff has sought records, including  
3 Mr. Osuna's mental health records from prior to March 8, 2019, which would show  
4 that CDCR officials were on notice of Mr. Osuna's ongoing desire to kill. Defendant  
5 Burnes argues that Mr. Osuna's mental health records are subject to the psychiatrist-  
6 patient privilege. After multiple hearings and multiple court filings this Order  
7 follows.

8  
9 **Stipulated Protective Order Entered January 8, 2024:**

10 On January 8, 2024, the Court granted the parties' Stipulated Protective Order.  
11 *See* Dkt. 76, "Stipulated Protective Order," (January 8, 2024). The Stipulated  
12 Protective Order allows for a party to designate certain protected materials as  
13 "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY." The  
14 Stipulated Protective Order strictly limits who is permitted to access and review  
15 protected material, to what purpose the protected material may be used, and how the  
16 protected material may be stored. The designation of "CONFIDENTIAL –  
17 ATTORNEYS' EYES ONLY" is for "extremely sensitive" confidential information  
18 or items, and prohibits disclosure to non-attorneys, "because such information  
19 threatens the safety of individuals or inmates, or threatens the safety and security of  
20 a prison." *Id.* at Para. 2.3. The duration of this protection extends "[e]ven after final  
21 disposition of this litigation." *Id.* at Para. 4.

22  
23 **March 6, 2024, Status Conference:**

24 On March 6, 2024, the Court convened a status conference to address ongoing  
25 discovery issues. *See* Dkt. 84, "Minute Order," (March 6, 2024). One issue was  
26 Plaintiff's Request for Production (RFP) Number **25**, "Please provide all documents  
27 that notify or describe that Jaime Osuna posed a risk to other inmates." At the  
28

1 hearing, “Plaintiff’s counsel noted that he had propounded a narrower version of  
2 Request for Production No. 25 in Plaintiff’s March 1, 2024 discovery requests.” *Id.*

3 The March 1, 2024, discovery requests by Plaintiff to Defendant Burnes  
4 included RFP Numbers 63 and 69:

5 **RFP No. 63** requests: “Please provide all documents that include and/or  
6 reference statements by Jaime Osuna pertaining to past acts of violence by Osuna  
7 himself.”

8 **RFP No. 69** requests: “Please provide all documents from CDCR employees,  
9 including CDCR healthcare staff, regarding any acts of violence, or articulations of  
10 a desire to commit violence, made by Jaime Osuna.”

11 Defendant Burnes did not produce mental health records of Jaime Osuna  
12 responsive to the above requests, pursuant to the psychiatrist-patient privilege,  
13 amongst other objections.

14  
15 **June 26, 2024, Status Conference:**

16 On June 26, 2024, the Court held a status conference and heard argument  
17 regarding ongoing discovery disputes. *See* Dkt. 93, Minute Entry (June 26, 2024).  
18 Plaintiff was to “provide a proposed order compelling production of the disputed  
19 mental health records.” *Id.* On July 6, 2024, Plaintiff submitted a Proposed Order  
20 Re: Release of Mental Health Records. *See* Dkt. 94, “Minute Order,” (July 6, 2024).  
21 Two days later, Defendant Burnes filed Objections to the Proposed Order. *See* Dkt.  
22 95, “Objections,” (July 8, 2024). Two days after that, Plaintiff filed her Reply to  
23 Defendant Burnes’s Objections. *See* Dkt. 96, “Reply,” (July 10, 2024).

24 The parties agree that absent an order compelling production of mental health  
25 records, Defendant Burnes did not produce certain mental health records of Jaime  
26 Osuna, pursuant to the psychiatrist-patient privilege.

1 **December 10, 2024, Discovery Conference:**

2 At Plaintiff's request, the Court held a Discovery Conference on December  
3 10, 2024. *See* Dkt. 118, Minute Order (December 10, 2024). The RFPs at issue  
4 included, *inter alia*, the following:

5 **RFP No. 31** requests, "Please provide all documents that reference all  
6 prescribed drugs (and doses) that Corcoran Prison medical staff provided to Jaime  
7 Osuna in the first three months of 2019."

8 **RFP No. 43** requests, "Please provide the entire C-File for Jaime Osuna."

9 **RFP No. 48** requests, "Please provide all documents that pertain to any act of  
10 violence by Jaime Osuna since 2011."

11 **RFP No. 58** requests, "Please provide all documents that the Institutional  
12 Classification Committee (ICC) --comprised of yourself (Burnes), E. Moreno and  
13 K. Kyle, LCSW -- reviewed and/or relied on in its determination made on January  
14 22, 2019 (reference is made to the "Classification Committee Chrono" at  
15 DEF004385)."

16 **RFP No. 62** requests, "Please provide all documents that include and/or  
17 reference statements by Jaime Osuna that reflect a desire to commit violence."

18 **RFP No. 63** requests, "Please provide all documents that include and/or  
19 reference statements by Jaime Osuna pertaining to past acts of violence by Osuna  
20 himself."

21 **RFP No. 74** requests, "Please provide all documents that the Wasco State  
22 Prison ICC relied on and produced in making the decision to single-cell Jaime Osuna  
23 in May 2017, including the mental health information that was considered by the  
24 Wasco State Prison ICC."

25 **RFP No. 84** requests, "Please provide all documents the Corcoran Prison ICC  
26 reviewed in conducting its Cell Status Review in January 2019."

27 **RFP No. 85** requests, "Please provide all documents that the Corcoran Prison  
28 ICC produced, including any notes or other work product, as it was conducting its

1 Cell Status Review in January 2019, other than the “Classification Committee  
2 Chrono” dated January 22, 2019 (see Bates “DEF004385”).”

3  
4 Defendant Burnes objected, including that materials responsive to these above  
5 requests were subject to the psychotherapist-patient privilege. At the December 10,  
6 2024, Discovery Conference, the Court heard argument from the parties and  
7 requested that Plaintiff file a Proposed Order Re: Mental Health Records. On  
8 December 11, 2024, Plaintiff filed a Proposed Order Re: Mental Health Records.  
9 *See* Dkt. 119, “Proposed Order Re: Mental Health Records,” (Dec. 11, 2024). On  
10 December 19, 2024, Defendant Burnes objected to the Proposed Order. *See* Dkt.  
11 123, “Objections,” (December 19, 2024).

## 12 13 **February 4, 2025, Discovery Conference:**

14 On February 4, 2024, at Plaintiff’s request, the Court held another Discovery  
15 Conference. The Request for Production included RFPs Numbers 31, 43, 48, 58, 62,  
16 63, 74, 84, and 85, as described above.

17 This Order follows.

## 18 19 **II. DISCUSSION**

### 20 **A. The Psychotherapist-Patient Privilege and Its Limits**

21 The Supreme Court in *Jaffee* recognized that the psychotherapist-patient  
22 privilege is not absolute: “[W]e do not doubt that there are situations in which the  
23 privilege must give way.” *Jaffee v. Redmon*, 518 U.S. 1, 18, n. 19, 135 L.Ed. 2d 337,  
24 116 S.Ct. 1923 (1996). Under *Jaffee*, the party claiming the privilege bears the  
25 burden of establishing it. *United States v. Romo*, 413 F.3d 1044, 1047 (9th Cir.  
26 2005); *Speaker v. Cnty. San Bernadino*, 82 F.Supp.2d 1105 (C.D. Cal. 2000) (burden  
27 of proof for the psychotherapist/patient privilege is on the party seeking to establish  
28 that the privilege exists). Not only is the psychotherapist-patient privilege not

1 absolute it is also not automatic. In *Romo*, the Ninth Circuit held that a defendant's  
2 confession to a prison counselor was not protected by the psychotherapist-patient  
3 privilege after the party invoking the privilege failed to establish sufficient facts.  
4 *United States v. Romo*, 413 F.3d at 1049.

5 The psychotherapist-patient privilege generally applies only when the mental  
6 health records are not disclosed to anyone; however, when communications are  
7 recorded in documents that are shared then *Jaffee* is inapposite. *Duenez v. City of*  
8 *Manteca*, 2013 U.S. Dist. LEXIS 24954, 20131 WL 684654, at \*20 (E.D. Cal. Feb.  
9 22, 2013) (holding the psychiatrist-patient privilege did not apply to psychological  
10 evaluations that were subsequently submitted to employer); see also *Phelps v. Coy*,  
11 194 F.R.D. 606 (S.D. Ohio 2000); *Kamper v. Gray*, 182 F.R. D. 597 (E.D. Mo.  
12 1998) (psychotherapist-patient privilege did not apply to communications, reports,  
13 notes, documents, and test scores from counseling sessions where results were  
14 subsequently submitted to employer).

15 When briefing is devoid of factual assertions and arguments are vague and  
16 conclusory, Defendants do not meet their burden for the psychotherapist-patient  
17 privilege to apply. *Debeaubien v. California*, 2021 U.S. Dist. LEXIS 79498, \*64  
18 (E.D. Cal. Apr. 24, 2021). Moreover, when defendants do not address why an  
19 already stipulated-to protective order is in place is not sufficient to address any  
20 privacy concerns, the psychotherapist-patient privilege will not apply. *Id.* at \*6  
21 (quoting *Soto v. City of Concord*, 162 F.R.D. 603, 617 (N.D. Cal. 1995) ("privacy  
22 interests may be sufficiently protected with the use of a 'tightly drawn' protective  
23 order")).

24 In multiple briefings, Defendant Burnes has argued that statements made by  
25 Jaime Osuna are psychotherapist-patient statements that are absolutely privileged.  
26 See Dkt. 95, "Defendant's Objections to Proposed Order" (July 8, 2024) at 2; Dkt.  
27 123, "Defendant's Objections to Proposed Order" (December 19, 2024), at 5.  
28 Defendant's assertion of an absolute privilege is legally incorrect.

1 In this case, specifically at issue are inculpatory, confessional statements  
 2 made by Jaime Osuna while in the custody of the CDCR, to CDCR employee(s),  
 3 about his own desire to kill. Communications of homicidal ideations are confessional  
 4 and in line with the facts of *Romo* and would not be protected by the psychotherapist-  
 5 patient privilege. *Romo*, 413 F.3d at 1049. Here, Defendant Burnes is not the party  
 6 to claim a privilege on behalf of Jaime Osuna, and even if he were, Burnes has not  
 7 asserted facts sufficient to establish the burden for the privilege to apply. The  
 8 standard set forth by the Ninth Circuit in *Romo* makes clear that the party invoking  
 9 the psychotherapist-patient privilege bears the burden of establishing it.

10 Defendant Burnes is incorrect that Jaime Osuna must affirmatively waive the  
 11 psychotherapist-patient privilege for the sought materials to be produced. The  
 12 burden is on Jaime Osuna, or anyone else asserting the privilege, to establish the  
 13 sufficient facts. Jaime Osuna has not asserted the psychotherapist-patient privilege,  
 14 and Defendant Sergeant Burnes has not met the burden of establishing that the  
 15 privilege applies here. Moreover, as discussed below, besides not asserting the  
 16 psychotherapist-patient privilege, Mr. Osuna (and the CDCR) have waived it.

## 18 **B. Waiver**

19 The Supreme Court in *Jaffee* recognized that the psychotherapist-patient  
 20 privilege could be waived: “Of course, the psychotherapist-patient privilege, like  
 21 other privileges, can be waived.” *Jaffee*, 518 U.S. at 15 n. 14.

22 In *Jaffee*, the Supreme Court repeatedly analogized the psychotherapist-  
 23 patient privilege to the attorney-client privilege. In the context of the attorney-client  
 24 privilege, nonwaiver must be proved by the party asserting the privilege. *See, e.g.*  
 25 *United States v. Martin*, 278 F.3d 988, 999-1000 (9th Cir. 2002) (noting that burden  
 26 is on party asserting attorney-client privilege to establish all elements of privilege,  
 27 which includes no waiver).



Two different approaches to the waiver have emerged since *Jaffee*. See *EEOC v. Cal. Psychiatric Transitions*, 258 F.R.D. 391, 394 (E.D. Cal. June 18, 2009). Under the broadest view, a party waives the privilege when he places his mental condition at issue. *Thomas-Young v. Sutter Cent. Valley Hosps.*, 2013 U.S. Dist. LEXIS 85377, \*12, 2013 WL 3054167 (E.D. Cal. June 17, 2013); *EEOC v. Cal. Psychiatric Transitions*, 258 F.R.D. 391, 400 (E.D. Cal. 2009) (holding the broad approach should apply even though no specific emotional injury claimed since emotional damages the crux of the claim); *Sanchez v. U.S. Airways Inc.*, 202 F.R.D. 131 (E.D. Penn. 2001) (Plaintiffs alleging Title VII violation waived the psychotherapist-patient privilege by alleging emotional distress); *Doe v. City of Chula Vista*, 196 F.R.D. 562, 567 (S.D. Cal. 1999) (Plaintiff in employment discrimination case who seeks to recover emotional damages is relying on her emotional condition as an element of her claim and waives the privilege); *Sarko v. Penn-del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997) (Plaintiff in Americans with Disability Act case who alleged defendant did not accommodate her depression waived psychotherapist-patient privilege); *I.R. v. City of Fresno*, 2014 U.S. Dist. LEXIS 52094, \*11-12 (E.D. Cal. Apr. 11, 2014) (privilege waived by Plaintiff whose complaint made generic allegations of emotional distress and protective order was in place).

Under the narrow approach, “the psychotherapist-patient privilege is waived only if the patient places the contents of the communication itself at issue, which excludes raising a claim of emotional distress.” See *EEOC v. Cal. Psychiatric Transitions*, 258 F.R.D. at 399 (citing *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 229 (D.Mass. 1997); see also *Rhodes v. County of Placer*, 2011 U.S. Dist. LEXIS 6248, \*18-19 (E.D. Cal. Jan. 13, 2011) (“Under the narrowest view, a party waives the privilege only when he or she affirmatively relies on the psychotherapist-patient communications”). However, even under the narrow approach, the privilege may be deemed waived if communication between a psychotherapist and patient was



1 itself put at issue by the patient. *EEOC v. Cal. Psychiatric Transitions*, 258 F.R.D.  
2 at 399. Regardless of approach, a Court can fashion protections to protect privacy  
3 rights. *Id.* (“A protective order, and a direction that any of the disclosed material  
4 filed with the court must be done under seal, will protect [party’s] privacy rights.”)  
5 Furthermore, even under the narrow reading, a party claiming the privilege waives  
6 it if the records in question are relevant to that party’s own claims. *Rhodes*, 2011  
7 U.S. Dist. LEXIS 6248 at \*18-19 (“plaintiff has waived the psychotherapist-patient  
8 privilege even under the narrower view of waiver...Plaintiff has affirmatively relied  
9 on otherwise potentially privileged communications.”)

10 Under any of these standards, CDCR and Jaime Osuna are both deemed to  
11 have waived the psychotherapist-patient privilege. In 2019, Jaime Osuna was  
12 charged for the murder of Luis Romero. *See People of the State of California v.*  
13 *Jaime Osuna*, (County of Kings Superior Court Case No. 19CM-1882). Mr. Osuna’s  
14 murder prosecution is ongoing. *Id.* In that case, two psychiatrists “reviewed  
15 hundreds of pages of medical records, including mental health records, turned over  
16 by CDC, as well as a report made in 2019 by another psychiatrist.”<sup>1</sup> Mr. Osuna’s  
17 criminal defense team relied on non-CDCR psychiatrists to review Osuna’s personal  
18 mental health records in order to argue that he did not understand the criminal  
19 proceedings against him, and as a result, in 2021, criminal proceedings were  
20 temporarily suspended until he was restored to competency. *Id.* On November 9,  
21 2022, a pretrial conference and preliminary hearing was set, and that hearing has  
22 been continued until April 3, 2025.<sup>2</sup>

23 In Mr. Osuna’s criminal defense case, the CDCR has turned over Jaime  
24 Osuna’s mental health, and Osuna’s defense placed his mental health at issue. This

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26 <sup>1</sup> Available at [https://www.kget.com/news/crime-watch/jaime-osuna-found-](https://www.kget.com/news/crime-watch/jaime-osuna-found-incompetent-to-stand-trial-in-cellmates-killing/)  
27 [incompetent-to-stand-trial-in-cellmates-killing/](https://www.kget.com/news/crime-watch/jaime-osuna-found-incompetent-to-stand-trial-in-cellmates-killing/)

28 <sup>2</sup> Available at [https://prod-portal-kingscounty-ca.ecourt.com/public-](https://prod-portal-kingscounty-ca.ecourt.com/public-portal/?q=node/394/578737/FV-Events-Portal)  
[portal/?q=node/394/578737/FV-Events-Portal](https://prod-portal-kingscounty-ca.ecourt.com/public-portal/?q=node/394/578737/FV-Events-Portal)

1 constitutes two forms of waiver. First, CDCR waived any assertion of the  
 2 psychotherapist-patient privilege, as it has already provided Mr. Osuna's mental  
 3 health records in a state forum. Second, Mr. Osuna waived the psychotherapist-  
 4 patient privilege under a narrow reading of waiver by affirmatively relying on his  
 5 own mental health records, which could include otherwise potentially privileged  
 6 communications. Furthermore, Mr. Osuna waived the psychotherapist-patient  
 7 privilege under a broader reading by placing his mental condition at issue in the first  
 8 place.

### 9 10 **III. CONCLUSION:**

#### 11 **GOOD CAUSE HAVING BEEN SHOWN, IT IS HEREBY ORDERED:**

12 Defendant Joseph Burnes is ordered to produce the mental health records of  
 13 Jaime Osuna (CDCR# BD0868), including the mental health records in Jaime  
 14 Osuna's C-File, and mental health records that include or reference: acts of violence  
 15 by Jaime Osuna; statements by Jaime Osuna that reflect a desire to commit violence;  
 16 statements by Jaime Osuna pertaining to past acts of violence by Osuna himself; and  
 17 mental health records that were reviewed or relied upon in any decision by CDCR  
 18 officials for Jaime Osuna to not be permitted to share a cell with another inmate (i.e.  
 19 be single-celled) and any decision by CDCR officials for Jaime Osuna to be  
 20 permitted to share a cell with another inmate (i.e. be double-celled).

21 The documents shall be marked "CONFIDENTIAL-ATTORNEYS' EYES  
 22 ONLY" in accordance with the protective order in this case. *See* Dkt. 76, "Stipulated  
 23 Protective Order," January 8, 2024. The produced mental health records are subject  
 24 to the following stringent protections:

25 "Unless otherwise ordered by the court or permitted in writing by the  
 26 Designating Party, Counsel for the Receiving Party may not disclose any  
 27 information or item designated "CONFIDENTIAL – ATTORNEYS' EYES  
 28 ONLY" to Plaintiff Solares, members of Plaintiff's family, friends or

1 associates of Plaintiff, or to any inmate, parolee, or person previously in the  
2 custody of CDCR or any of their relatives, friends, associates, or the public.  
3 Counsel for the Receiving Party also may not disclose any information or item  
4 designated “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” to Defendant  
5 Burnes or any other CDCR employee unless that person otherwise qualifies  
6 to receive it under this section. Unless otherwise ordered by the Court or  
7 permitted in writing by the Designating Party, only Counsel for the Receiving  
8 Party may have access to and review any information or item designated  
9 “CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

10 *See* Dkt. 76, “Stipulated Protective Order,” January 8, 2024, at 9-10.

11  
12  
13 DATED: February \_\_\_, 2025

\_\_\_\_\_  
United States District Judge  
HON. LEE H. ROSENTHAL

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16 Presented By:

17 /s/ Erin Darling  
18 ERIN DARLING  
19 Attorney for Plaintiff  
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